FILE COPY.

Office Supreme Court U.
FILED
DEC 16 1904
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 406.

FREDERICK A. HYDE, APPELLANT,

vs.

JOHN H. SHINE, UNITED STATES MARSHAL FOR NORTHERN DISTRICT OF CALIFORNIA, ET AL.

Brief on Behalf of Appellant in Opposition to the Motion to Advance.

C. C. COLE,
In behalf of Garrett W. McEnerney,
Attorney for Appellant.

THE LAW REPORTER PRINTING CO., WASHINGTON D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 406.

FREDERICK A. HYDE, APPELLANT,

vs.

JOHN H. SHINE, UNITED STATES MARSHAL FOR NORTHERN DISTRICT OF CALIFORNIA, ET AL.

Brief on Behalf of Appellant in Opposition to the Motion to Advance.

This is an appeal from the judgment of the Circuit Court of the United States for the Northern District of California denying the prayer of the petition of the appellant for a writ of *habeas corpus* to the marshal of the district, and a writ of *certiorari* to the United States Commissioner before whom the appellant was examined upon the indictment, hereinafter mentioned, and the clerk of the district court of the United States for said district, in whose office the record made before the commissioner is filed. Each of the officers were made defendants to the petition filed in the circuit court and are appellees in this appeal.

The indictment which formed the basis of the proceeding against the appellant in the northern district of California, where he resides, was presented in the Supreme Court

of the District of Columbia at the January term thereof, 1904.

The defendants mentioned in the indictment are the appellant, Frederick A. Hyde, and also Henry P. Diamond, John A. Benson, and Joost H. Schneider. The three first named are, and were at the time of the finding of the indictment, and for many years prior thereto had been, citizens and residents of San Francisco, California. Schneider was and is a resident of the Territory of Arizona. The indictment attempts to charge a conspiracy amongst the defendants under section 5440 of the Revised Statutes of the United States to defraud the United States out of possession of and title to public lands. It appears upon the face of the indictment that a great majority of all the acts that are alleged to have been performed by the defendants in pursuance of the alleged conspiracy were performed in the States of California and Oregon and many of them within the jurisdiction of the District Court of the United States for the Northern District of California, where three of the defendants reside.

A copy of said indictment is on file as a part of the record in this cause, and there is endorsed thereon the names of thirteen witnesses as having been examined before the grand jury that presented the indictment. The record of the proceedings before the United States Commissioner, hereinbefore referred to, shows that eleven of those witnesses are residents of California, Oregon, or Arizona. It also sufficiently appears by the record in the case that a very large majority of all the witnesses that would be necessary to be examined upon either side in case of a trial of said indictment before a jury also reside within the States and Territory above mentioned.

Amongst the questions made in the petition for a writ of certiorari and the assignments of error upon appeal to this court are, that the arrest and detention of the appellant is in violation of various provisions of the Constitution

of the United States and the amendments thereof; that the Supreme Court of the District of Columbia is without jurisdiction of the case; that the appellant is restrained of his liberty without due process of law; that the indictment charges no offense against the United States under section 5440; that the alleged facts set forth in the indictment affirmatively show that the United States was not and could not have been defrauded by the execution of the alleged conspiracy; that the allegations of the indictment are so involved, uncertain, contradictory, insensible, and repugnant that it is not a compliance with the constitutional provision that the defendant should be informed of the cause and the nature of the accusation against him; that the alleged indictment and proceedings under it are in violation of the constitutional provision that citizens shall be secure in person against unreasonable seizures, and that the accused shall have the right to a speedy and public trial by an impartial jury of the State and district wherein the alleged crime shall have been committed; and that a removal of appellant from California to the District of Columbia for trial, under the circumstances, would be in violation of the letter and spirit of these constitutional provisions.

The Ground Alleged by the Government in Support of the Motion to Advance.

The only ground mentioned in the motion to advance is that it is considered that the application for the writs of habeas corpus and certiorari was instituted and the appeal taken for the purposes of delay. It is submitted that there is no evidence in the record of this case, nor is any offered in support of the motion to sustain that allegation. On the contrary, an examination of the record will show that the questions made by the appellant in the proceedings before the commissioner and in the circuit court were made in good faith and in the belief that the pro-

ceedings of the Government against him are irregular, illegal, and unconstitutional, and upon which the appellant is entitled to the judgment of this court and may reasonably anticipate that it will be favorable to his contention.

The third subdivision of rule 26 of this court provides that "criminal cases may be advanced by leave of the court on motion of either party." That part of the rule, of course, does not apply to the present case, as this court has frequently held that a proceeding in habeas corpus is not a criminal case, although it may grow out of one.

> Cross *vs.* Burke, 146 U. S. 88, and other cases there cited.

Subdivision 5 of said rule 26 provides that:

> "Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also, by leave of the court, be advanced on motion of the Attorney-General."

If either subdivision of that rule applies to the present case this is the one. Subdivision 6 of said rule 26 provides that:

> "All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application."

Attention is called to the fact that the motion to advance in this case contains no statement of fact showing that the matter involved is "of general public interest" within the meaning of the fifth subdivision. Undoubtedly the administration of justice is in one sense matter of public interest, but the meaning of the language of this subdivision is that the administrative interests of the Government demand an early disposition of the subject-matter of the controversy. This is shown by the language of this court in the case of

the United States against Norton, 91 U. S. 558, which was a motion on behalf of the Attorney-General to advance a criminal case. While the motion was granted, it is substantially stated in the opinion that subsequent motions of the same character would not be granted unless the statement of facts contained in the motion showed that the Government would suffer embarrassment in the administration of its affairs unless the cause was speedily disposed of. The opinion is in the following language:

> "This is a criminal case. The motion to advance is made on behalf of the United States, upon the representation of the Postmaster-General, in substance, that the questions in dispute will embarrass the operations of the Government while they remain unsettled. As our rule has but recently gone into operation, we will, in this case, accept this statement as sufficient and grant the motion. Hereafter, motions to advance upon this ground must state the facts in such manner that we may judge whether the Government will be embarrassed in the administration of its affairs by delay. In the present crowded state of the docket, it is our duty to see that cases are not unnecessarily brought forward to the prejudice of others."

That some such consideration should exist to justify the court in granting the motion is also shown by the language of the court in the case of Ward *vs.* The State of Maryland, 12th Wallace, 163, which is as follows:

> "Under that rule, the motion is addressed to the discretion of the court, and inasmuch as it appears that the defendant is not in jail, the court fails to see any reason for granting the motion."

There are not only no facts stated in the motion in this case showing that the operations of the Government will be embarrassed unless there be an early determination of the controversy, but there is even no statement of a con-

clusion to that effect, as there was in the Norton case. It is said in the motion that the advancement is desired "in order that the appellants may be speedily brought to trial," but this is not such ground as the rule contemplates. It undoubtedly appears by the record in this case, as hereinbefore suggested, that the District Court of the United States for the Northern District of California, where three of the defendants in the indictment reside, has jurisdiction, and if the Government had seen fit to proceed in that court, if it could have obtained an indictment at the hands of a grand jury there, a trial of the case might have been had by this time; and by commencing proceedings there now a trial could be had in that court earlier than one could be had in the Supreme Court of the District of Columbia, even if the motion to advance should prevail and the Government should be successful in having the defendants transferred to this District for trial. Why should the Government desire a trial here rather than in California or Oregon, when it will be certainly more expensive for the Government and very much more expensive for the appellant, as he would have to bring numerous witnesses from the Pacific coast here in his defense?

No Reasonable Ground to Advance Exists.

It is respectfully submitted that the foregoing statement is borne out by the record and shows that there is no reasonable ground for the motion. If the Government desires to harass appellant and the other defendants in this indictment by requiring them to travel across the continent to defend themselves, its proceedings to that end should not be by the action of the court taken out of the ordinary rules of practice and procedure, but should be permitted to take the regular course of other cases.

But if the court should take the view that it is proper to grant the motion I am requested by Mr. Garrett W. Mc-

Enerney, counsel and attorney of record for the appellant, to ask that the day for argument be not fixed earlier than the first of March next. Mr. McEnerney had charge of the case for the appellant before the commissioner and in the circuit court, and is familiar with all the questions arising in the case, and it is his desire and the desire of appellant that he should argue the case in this court. His engagements are such that it would be very inconvenient, if not impossible, for him to be here to argue the case earlier than the time above mentioned.

I desire also to suggest that the record was recently filed in this court and has not yet been printed; that it is somewhat voluminous; that the indictment alone will make about 125 printed pages of a record of this court, and all the intervening time from now until March would certainly be required by Mr. McEnerney in the preparation of his brief and argument, in connection with his other absolute professional engagements.

C. C. COLE,
In behalf of Garrett W. McEnerney,
Attorney for Appellant.